General Principles of EU Law and Audit Practice of EU Funds

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Introduction

The European Union (EU) "is based on the rule of law"[1]. According to the Court of Justice of the European Union (ECJ), this means that the acts of the EU institutions have to comply "with EU law and, in particular, with the Treaty [provisions] and the general principles of [EU] law"[2].

The general principles of EU law are thus an essential part of the body of that law. These principles have been drawn by the ECJ mainly from the constitutional traditions common to the Member States. General principles of EU law therefore normally have a counterpart in the national laws of the Member States. One may think, for example, of the principle of non-discrimination on grounds of sex and sexual orientation, the principle of proportionality, the principle of legal certainty, etc. which are guaranteed in both the national and EU legal orders.

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1 ECJ, *E and F*, C-550/09, EU:C:2010:382, para. 44; see also ECJ, *Les Verts v. European Parliament*, 294/83, EU:C:1986:166, para. 23.

2 *Ibid.*

The European Court of Auditors (the "ECA") is an institution of the European Union[3] and must, in the performance of its tasks, respect these general principles of EU law. The general principles of EU law that are most relevant to the daily tasks of auditors are the principle of legal certainty, the protection of legitimate expectations, the principle of proportionality, the principle of transparency and the right to privacy, as well as principles of good administration.

Those general principles of EU law are well-known in the administration of justice and in public administration. In the daily activities of auditors they are, to a certain extent, overshadowed by the emphasis placed on audit standards. This article examines a number of general principles of EU law and describes their application in the field of auditing by reference to the activities of the ECA.

General Principles of EU Law: Sources and Status

In terms of the hierarchy of norms, general principles of EU law rank on the same level as the EU Treaties, the highest source of law, as was recognised in the seminal *Les Verts* case[4]. That case was regarded as important by lawyers, both inside and outside the European Union, because it was the first explicit judicial acknowledgement that the then "Community" was based on the rule of law. This meant that all actions of the EU institutions had to comply with EU law, in particular with primary or Treaty law, as well as with general principles of EU law[5]. Thus, today one can say that general principles of EU law are just as important as Treaty obligations and that together they constitute the core of EU law. In practice, however, those who have to apply those general principles, for example in everyday audit practices, do not always pay sufficiently close attention to the need for such application.

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[3] See Article 13 TEU.

[4] ECJ, *Les Verts v. European Parliament*, 294/83, EU:C:1986:166.

[5] *Ibid.*, para. 23.

Looking for General Principles of Audit

Feedback from beneficiaries of EU programmes raises questions as to which general principles of EU law are relevant to audit and as to the source of those principles. Principles of good audit need to comply with a range of general principles of EU law. For example, the principle of legal certainty requires that the effects of audit rules be clear, precise and predictable[6]. But is this actually the case in practice? Let us take an example. A research institute is the beneficiary of EU funding. The use made of that funding is not only verified by the institute's own auditors and professional project managers, but also by auditors working on behalf of the European Commission hired from private accountancy firms. Initially, no concerns are raised with the research institute regarding its financial oversight and administration. After several years of research work, another auditor raises serious objections concerning the calculation of the overhead costs of the project, to the surprise and consternation of the beneficiary, who has acted in good faith at all times[7]. The beneficiary asks the auditor to indicate precisely how the relevant norms or rules are to be interpreted and why he was initially considered to be in compliance, then not in compliance, with them; he also wishes to know on the basis of which audit practice objections are now being raised. If the answer is that "these audit practices are secret" or "we are independent and make our own judgments", or indeed that "the rules are the rules", then we submit that such an audit practice would not only cause intense frustration to the institute that is subject to the audit but would also give rise to a serious threat to legal certainty. From the beneficiary's perspective, whilst compliance with proper auditing standards is both necessary and legitimate, it has a need and indeed a right to know in advance exactly what the applicable rules are and how they will be interpreted by

[6] ECJ, *European Parliament v. Council*, C-48/14, EU:C:2015:91, para. 45 and the case law cited.

[7] For the purposes of our hypothetical example, it is assumed that the beneficiary acts in good faith and is therefore willing to comply with the rules, unlike a beneficiary who is not acting in good faith.

whichever auditors are appointed to examine their accounts, especially where one set of auditors succeeds another. The question thus arises of how compliance with legal certainty as a general principle of EU law is secured, for example by its incorporation into principles of good audit.

GENERAL PRINCIPLES OF EU LAW: TRIPLE FUNCTION[8]

General principles of EU law originating from European constitutional traditions have three distinct, yet related, functions in the EU legal order.

1. Firstly, they have enabled the ECJ to fill *normative* gaps left by the authors of the Treaties or legislators, in the case of secondary legislation. This was of particular importance at the initial stages of development of the EU legal system when legislation was sometimes incomplete, thus leaving wide room for interpretation - or misinterpretation - and creating legal uncertainty. Consequently, general principles of EU law were instrumental in the development of the EU legal system. They enabled the ECJ to ensure that system's autonomy as a self-standing system of law and to promote much-needed coherence and unity within it.

2. Secondly, general principles of EU law have served as an aid to the *interpretation* of substantive rules of law. In practice, this means that primary, secondary as well as national implementing legislation must be interpreted in light of those principles, thus contributing to the coherence of the

[8] See K. LENAERTS / J.A. GUTIÉRREZ-FONS, The constitutional allocation of powers and general principles of EU law (2010) 47 *Common Market Law Review* 1629.

EU legal system and avoiding divergent interpretations of certain rules[9].

3. Thirdly, these principles can also provide grounds for judicial review. EU legislation that breaches a general principle of EU law is to be held void[10].

Certain general principles of EU law such as the principle of transparency, the right to privacy and principles of good administration are also reflected in specific provisions of the Charter of Fundamental Rights[11], which itself has the same legal value as the Treaties[12]. Acts of the EU institutions that interfere with the exercise of those rights must be provided by law, must respect the essence of the right and must have due regard to the principle of proportionality.

PRINCIPLES OF GOOD ADMINISTRATION

Principles of good administration exist both in the legal systems of the Member States and at European Union level. Today, they derive in part from case law, in part from the consolidation of earlier case law in constitutional or legislative texts. In this respect, Article 41 of the Charter of Fundamental Rights - which acquired the status of a binding primary law provision with the entry into force of the Lisbon Treaty - marks an important step in the development of general principles of good administration in EU law. Article 41 explicitly provides for the "right to good administration", which en-

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[9] See, with regard to the principle of equal treatment, ECJ, *Sturgeon and Others*, C-402/07 and 432/07, EU:C:2009:716, paras 48 and 60.

[10] See ECJ, *Commission v. Kadi and Others*, C‑584/10 P, C‑593/10 P and C‑595/10 P, EU:C:2013:518, para. 67.

[11] See Articles 7 (respect for private and family life), 41 (right to good administration) and 42 (right of access to documents) of the Charter of Fundamental Rights of the European Union.

[12] Article 6(1) TEU.

compasses the right for a person to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union and which includes, among other things, the right to be heard and the right of a person to have access to his or her file. The right to be heard implies, in turn, that fair and reasonable deadlines should be granted to individuals in order to allow for the effective exercise of this right.

More generally, the principles of good administration encompass not only the "right to good administration" and its related rights, as provided for by Article 41 of the Charter of Fundamental Rights, but also, more broadly, other related principles of law. In the first place, mention must be made of the principle of proportionality, on the basis of which, in broad terms, the means employed should be appropriate with regard to the objectives to be achieved[13]. Secondly, the principles of legal certainty and legitimate expectations are of particular importance in order to ensure 'good administration' since individuals are entitled to know in advance the rules which are applicable to them, so that they may order their affairs accordingly.

Those general principles are applicable to any action taken by the EU institutions, agencies and other bodies and they complement the laws and rules which are adopted in specific fields. Individuals have the right to be treated in accordance with those principles in the preparation or execution of any action of the EU institutions or of agents acting in their name. This means that internal and external auditors acting on behalf of the Commission, as well as the ECA itself, are bound by these principles when performing the tasks assigned to them. The complexity of the EU's organisation and management means that many other entities are involved in administration on the EU's behalf and they too are therefore subject to those same general principles of EU law. For instance, many EU programmes are executed jointly under systems of shared management by EU institutions and other bodies in collaboration with national

[13] The proportionality principle has a much broader scope, as it is laid down in Article 5 of the TEU. The criteria for applying this Article are set out in the Protocol (No 2) on the application of the principles of subsidiarity and proportionality annexed to the Treaties.

authorities in the Member States. Those national authorities and related administrative bodies must also act in conformity with those general principles of EU administrative law when carrying out tasks that fall within the scope of EU law.

Having established which general principles of EU law are most relevant to the operations of the ECA and examined both the source of those principles and the means by which they are enshrined in EU law, we may proceed to study certain of them in more detail, as they are applicable to the activities of auditors, in the search for EU principles of good audit.

THE PRINCIPLES OF LEGAL CERTAINTY AND LEGITIMATE EXPECTATIONS

The principle of legal certainty has been recognised as one of the general principles of EU law by the ECJ since the 60s[14]. This principle is a cornerstone of a system based on the rule of law as individuals need to know precisely what their rights and obligations are. In that regard, this general principle requires all legislative or administrative action to meet certain conditions. Firstly, the effects of any rule need to be *precise*. Secondly, they need to be *clear*. Thirdly, and finally, they must be *predictable*. Furthermore, although this is not normally mentioned as a separate condition, it is self-evident that rules of law also need to be publicly available in order to ensure legal certainty for subjects of the law.

In that regard, a judgment of the General Court of the European Union (the "EGC")[15] neatly illustrates the importance of the unambiguity of rules of law[16]. The case related to a Commission decision refusing a refund on anti-dumping duties. The applicant argued, in

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[14] ECJ, *Société Nouvelle des Usines de Pontlieue Aciéries du Temple (SNUPAT) v. High Authority of the European Coal and Steel Community*, 32/58 and 33/58, EU:C:1959:18.

[15] Formerly the Court of First Instance of the European Communities (the "CFI").

[16] EGC, *Beco v. Commission*, T-81/12, EU:T:2014:71

particular, that the Commission's interpretative notice, on which that decision relied, was ambiguous and therefore in breach of the principle of legal certainty with regard to the time-limits for applying for such a refund. The EGC indeed found that the interpretative notice contained an internal contradiction on a key point relevant to the applicant's claim for a refund and therefore held that the notice 'which is nevertheless intended to give clarification to economic operators about the procedure for refunds of anti-dumping duties, and to increase their legal certainty, achieves the opposite result'. On that basis, the decision of the Commission was annulled by the EGC since it did not comply with the general principle of legal certainty.

Another important element of the principle of legal certainty is *consistency*. Indeed, where rules are applied in an inconsistent manner that inconsistency may not only be at odds with the principle of legal certainty but may also lead to a breach of the principle of equal treatment. But what happens if an institution decides to change certain rules? Surely it must be allowed to do so? In principle, yes it may, provided that it does not apply the new rules retroactively. To illustrate that point, another case may be cited. It related to a grant of State aid in the steel sector[17]. The Commission adopted a code in which it set out the conditions under which a Member State could grant aid to steel companies. The Commission then decided to change this code and to apply those changes retroactively, applying the new rules to aid that had already been paid out while the previous steel code was in force. The ECJ ruled that such retroactive application of the Commission's new code violated the principle of legal certainty. Thus, this case supports the proposition that the principle of legal certainty precludes EU measures from taking effect from a point in time prior to their publication.

Nevertheless, there are certain circumstances under which such retroactive application may be justified. These situations are those in which the purpose to be achieved *requires* the retroactive appli-

[17] ECJ, *Falck and Acciaire di Bolzano v. Commission*, C-74/00 P and C-75/00 P, EU:C:2002:524.

cation of a measure, notwithstanding the fact that the legitimate expectations of those concerned must still be respected. Such a scenario arose in a case where the Commission had decided to adopt a new method of calculating fines to be imposed on undertakings for infringements of EU competition law rules. The new method would increase the amount to be paid in fines and was applied to infringements that occurred before the new regime came into force. In this instance, the ECJ held that this was necessary in order to implement competition policy effectively and that it did not violate the legitimate expectations of those concerned. This exception to the general rule of non-retroactivity was accepted by the ECJ specifically because it was deemed necessary for the achievement of the objective being pursued - the effectiveness of competition fines, whose level the Commission remains free to adjust in accordance with its competition policy. Such changes were therefore foreseeable for the economic operators affected and did not consequently breach their legitimate expectations[18].

The *Lagardère* case[19], also relating to competition law, once again confirms the exceptional nature of the retroactive application of measures. This case concerned a Commission decision declaring a merger to be compatible with the internal market. However, three weeks later the Commission notified the parties that a decision amending the preceding decision had been issued following an error. The new decision stated that certain contractual clauses were no longer to be regarded as ancillary to the merger, meaning that they were not covered by the approval decision. The CFI, as it then was, declared the withdrawal of the original decision to be unlawful, since only *illegal* administrative acts may be withdrawn retrospectively, such withdrawal being subject, moreover, to strict conditions. Thus, withdrawal of the decision would only have been possible if it had taken place within a reasonable time, if there had been

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[18] ECJ, *Dansk Rorindustri and Others v. Commission*, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02P, EU: C:2005:408, paras 226-232.

[19] CFI, *Lagardère and Canal+ v. Commission*, T-251/00, EU:T:2002:278.

reasons to believe that its *lawfulness* was in question and provided that the Commission had sufficient regard to how far the parties concerned might have been led to rely on the lawfulness of the measure. Since those conditions were not satisfied, the original decision declaring the merger to be compatible with the internal market could not be withdrawn.

General Principles of EU Law and International Audit Standards

How do these general principles of EU law apply to the world of audit? As mentioned in the introduction, legal certainty plays an important role given that the ECA's activities can have consequences for both institutions and individuals. For example, if it is found that a certain transaction has been affected by an error or irregularity, the auditors will forward this to the competent authorities, normally the Commission, which will be responsible for recovering the money, or to OLAF, which will conduct an investigation in cases of fraud. In this sense it is important for the beneficiaries of EU aid to be certain of their rights and obligations, particularly where a withdrawal of benefits is likely to be imposed, since this may have devastating consequences for a beneficiary of an EU programme, potentially leading to bankruptcy in some cases.

As was explained above, the EU's legal system is based on the rule of law which means that its institutions have to comply both with the Treaties and with general principles of EU law. The ECA is no exception. Therefore, as a starting point, it is crucial to establish which rules apply to its activities. The ECA conducts its audits in accordance with international standards on auditing issued by the *International Organisation of Supreme Audit Institutions* (INTOSAI). These standards often derive from rules developed as informal or 'soft' law on the basis of international cooperation. For internal auditors, for example, the *Institute of Internal Auditors* (IIA) has enacted *Standards for the professional practice of internal auditing*. For external audits by *Supreme Audit Institutions* (SAIs) INTOSAI has enacted *International Standards of Supreme Audit*

Institutions (ISSAIs). Furthermore, the principles and detailed rules governing the ECA's approach to auditing are set out in a set of manuals, standards and guidelines. One may observe that the ECA's operations are not governed by rules of law *sensu stricto* but rather by self-imposed policy rules derived from generally-accepted auditing practice. This is because the standards that the ECA applies are not set by the EU legislator but are rather derived from internationally applicable standards. As such, the fact that self-imposed policy rules apply to the operations of the ECA does not raise concerns from a legal certainty point of view as long as the rules are clear, precise and foreseeable. If the rules that the ECA applies to its activities are publicly available and are unambiguous, then those conditions are fulfilled. However, compliance with the principle of legal certainty also requires that those self-imposed rules should be applied in a consistent manner. Otherwise, the ECA would run the risk of breaching not only the principle of legal certainty but also the principle of equal treatment[20]. Such inconsistent application would mean that the rules applied were no longer predictable and, furthermore, that they were not the same for everyone.

This does not mean that the ECA is prevented from changing its own auditing standards. It does mean, however, that when it decides to do so, the new standards cannot, in principle, be applied retroactively. This principle applies not only to audit standards as such, but also to the interpretation given to the rules that auditors use in assessing whether the European Commission or the beneficiaries of EU funds have complied with EU law.

What would happen if the ECA reconsidered a previous statement made with regard to the reliability of certain accounts? Would such a 'reconsideration' violate the general principles of EU law, more particularly the principles of legal certainty and legitimate expectations, if it were to call into question a right previously recognised under EU law, as in the above-mentioned *Lagardère* case in rela-

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[20] ECJ, *Dansk Rørindustri and Others v. Commission*, C-89/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, para. 211; ECJ, *Banco Privado Português and Massa Insolvente do Banco Privado Português*, C-667/13, EU:C:2015:151, para. 69.

tion to the Commission? In that instance, the fact that a measure was not illegal precluded the Commission from simply withdrawing the decision granting an undertaking a particular right, namely the approval of its proposed merger. It is submitted that, by analogy, this should also be the case for ECA activities and decisions. However, until now there have not been any cases before the EU courts concerning the application of the legal certainty principle to ECA findings.

Furthermore, it is legitimate to ask what should happen if, as in the above-mentioned example concerning EU funding, an auditor is hired by the Commission to conduct certain audits and the beneficiary does not know, for instance, what standards that auditor will be applying? It is submitted that this would directly contravene the principle of legal certainty as it applies to the beneficiary.

THE PRINCIPLE OF PROPORTIONALITY

The principle of proportionality, like the principle of subsidiarity, governs the exercise by the EU of its powers. It aims to set specific boundaries which the actions of the EU institutions must not exceed. The principle is laid down in Article 5 of the Treaty on European Union (TEU) and it establishes that any action of the EU must be limited to what is necessary to achieve the objectives of the Treaties. This means that both the content and the form of EU actions must directly relate to the aim pursued and must be appropriate to achieve that aim without going beyond what is necessary.

An exhaustive analysis of the proportionality principle falls outside the scope of this paper. Suffice it to say, for present purposes, that in relation to audit practices the principle is relevant to particular aspects of an auditor's functions, such as access to financial and accounting documents. The work of auditors is necessarily based on records held by auditees; access to information and documents is therefore crucial.

Article 287(3) TFEU explicitly provides, in this respect, that "institutions of the Union, any bodies, offices or agencies managing revenue or expenditure on behalf of the Union, any natural or legal

person in receipt of payments from the budget, and the national audit bodies […] shall forward to the [ECA], at its request, any document or information necessary to carry out its task."[21] Thus, the question arises whether a request for information made by the ECA could be found to violate the principle of proportionality.

In some cases, the accounting and reporting practices of public authorities as well as those of private companies make the gathering of certain specific information particularly burdensome. In this respect, the relevant question to be asked is when a request to access information breaches the principle of proportionality, due to the fact that it is unreasonably difficult to access the information sought.

In order to answer this important question one needs to look at the case law of the EU courts and, in the absence of any concrete cases relating specifically to the ECA, State aid law may be used to draw relevant analogies[22]. The *Deutsche Post*[23] case concerned an investigation by the Commission into alleged aid received by Deutsche Post. While conducting its investigations the Commission addressed a formal decision to the German government ordering it to provide extensive information on that undertaking's activities. The company brought an action for annulment before the EGC on the basis that the principle of proportionality had been infringed, since the request at issue required a disproportionate investment on its part in terms of time and effort. The EGC ruled that an institution can only request information that is relevant for the performance of its tasks which, in the case at hand, meant that the information requested had to be relevant to the assessment of whether the measure concerned

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[21] The Member States must cooperate in good faith with the ECA when it carries out an audit having a direct link to the powers conferred on it by Art. 287 TFEU (see ECJ, *Commission v. Germany*, C-539/09, EU:C:2011:733).

[22] In ECJ, *Commission v. Germany*, C-539/09, EU:C:2011:733, the Advocate General paid particular attention to the proportionality principle in ECA audits (points 87-92 and 123-140). However, the ECJ did not rule on this issue in its judgment.

[23] EGC, *Deutsche Post v. Commission*, T-570/08 RENV, EU:T:2013:589.

constituted State aid and whether that aid was compatible with the internal market[24]. An important point to be made here is that the relevance of the information requested is assessed at the moment when the request for information is made and not at a later stage of the procedure. Thus, in principle, auditors of the ECA may request information from private companies or public authorities in the course of their audit activities without violating the principle of proportionality *as long as* it may reasonably be considered, at the time when the request is made, that the information at issue is relevant to the performance of their tasks.

Bearing this in mind, compliance with the principle of proportionality requires that, when requesting information from an undertaking, the provision of that information should not place a disproportionate burden on that undertaking, having regard to the objective needs of the investigation[25]. If, therefore, the request for information relates to a minor correction of an amount, the auditors must have regard to the principle of proportionality and assess whether the request will create a disproportionate burden for the auditee. For example, where a week's worth of man-hours would need to be expended in order to comply with a request and it is already apparent in advance that the correction at issue will amount, at most, to a paltry sum such as EUR 40, then it would be highly questionable whether that request could be reconciled with the principle of proportionality.

This simple example illustrates the fact that, like the principle of legal certainty, the principle of proportionality also has an important role to play in audit activities, particularly with regard to issues of access to information and documents. The question is not so much whether this principle is applicable to the activities of auditors - the answer is clearly yes - but rather to what extent auditors apply it in practice. It is desirable that auditors should have due regard to this principle when requesting information, as it would

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[24] *Ibid*., para. 118.

[25] EGC, *Slovak Telecom v. Commission*, T-458/09 and T-171/10, EU:T:2012:145, para. 81.

make the use of EU funds more attractive for beneficiaries. Applying for and receiving EU subsidies is already a complex process and while auditing is vital in order to check that public money is being spent appropriately it should not have a chilling effect on the optimal use of EU funding. Prospective beneficiaries may be dissuaded from applying for such funding in the first place if the auditing procedures, to which they are potentially subject *ex post* as recipients of EU grants, are unduly onerous. That is why the proper application of the principle of proportionality is vital in order to make EU funding more attractive and less cumbersome for beneficiaries.

THE PRINCIPLE OF TRANSPARENCY

In accordance with Article 15(3) TFEU, each institution "shall ensure that its proceedings are transparent and shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents". The rules which the ECA adopted in this regard[26] aim to promote "good administrative practice on access to documents"[27]. As the preamble to ECA Decision No 12-2005 on access to documents indicates, "[o]penness enhances the [ECA's] legitimacy, effectiveness and accountability, thus strengthening the principles of democracy"[28].

However, the principle of transparency has to be balanced against certain public and private interests. The ECA applies certain exceptions to the general rule of openness under Decision No 12-2005. These exceptions mostly correspond to those used by the European Parliament, the Council and the Commission under Regulation

[26] Article 30 of the ECA's Rules of Procedure (OJ 2005 L 18/1) and Decision No 12-2005 of 10 March 2005 regarding public access to ECA documents, as amended by Decision No 14-2009.

[27] Decision No 12-2005, preamble, third recital.

[28] *Ibid.*

No 1049/2001[29]. The case law regarding the latter regulation is therefore relevant to the interpretation of the ECA's rules on access to documents.

The ECA will, *inter alia*, refuse access to a document where disclosure would undermine the execution of one of its audits[30]. This is likely to be the case when an audit is still ongoing[31]. By contrast, where the audit has been completed, the institution concerned will have to examine, in a concrete and individual manner, whether non-disclosure of documents relating to the audit is still justified; this may be the case if an investigation other than the audit itself is still in progress which could be jeopardised by the disclosure[32].

When deciding whether or not to grant access to a particular document, the ECA is also under a duty to respect the rights of individuals to privacy and to the protection of their personal data. These rights, which form an integral part of the general principles of EU law, are furthermore enshrined in Articles 7 and 8 of the Charter of Fundamental Rights. For this reason, the ECA's policy on access to documents[33] provides that disclosure of a requested document will be refused where it would undermine the 'privacy and the integrity

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[29] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145/43).

[30] Regulation No 1049/2001, Article 4(3).

[31] EGC, *Technion and Technion Research & Development Foundation v. Commission*, T-480/11, EU:T:2015:272, paras 59 and 65.

[32] See EGC, *Franchet and Byk v. Commission*, T-391/03, EU:T:2006:90, paras 110-124; EGC, *Toland/Parliament*, T-471/08, EU:T:2011:252, paras 42-58. These cases concerned requests for access to audit reports in circumstances where other investigations being undertaken by national authorities and by the internal services of the European Parliament, respectively, were still ongoing. However, Article 4(2) of ECA Decision No 12-2005 provides that the ECA "shall refuse access to its audit observations. It may also refuse access to documents used in the preparation of those observations". Article 4(3) of this Decision further provides that the ECA "shall refuse access to a document where disclosure would undermine the protection of […] inspections, investigations and audits".

[33] Decision No 12-2005.

of the individual'[34]. That ECA Decision also makes reference to the EU legislation regarding the processing of personal data, *i.e.* Regulation No 45/2001[35].

ECA documents may indeed contain personal data, such as the names of individuals who were present at a particular meeting. There is potentially a tension between the provisions of ECA Decision No 12-2005 ('the applicant is not obliged to state reasons for the application')[36] on access to documents and the provisions of Regulation No 45/2001, which imply that personal data can only be transferred to another person 'if the recipient establishes the necessity' for that transfer[37]. However, it is only *after* the necessity requirement set out in that latter Regulation has been met that ECA Decision No 12-2005 is applied and that the ECA will therefore proceed to examine whether the exception protecting the right to respect for a person's private life laid down in that Decision is relevant.

The Right to Privacy and Principles of Good Administration

Merely making reference, in a document, to personal data such as the names of individuals is wholly different from criticising a person's behaviour. When conducting audits and subsequently publishing reports on particular institutions or undertakings, there will, however, be instances where the particular behaviour of a given individual or of an institution as a whole is criticised. Such criticism may inevitably lead to reputational damage. So what are the rules that apply in situations of this type where such criticism is war-

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[34] Decision No 12-2005 Article 4(1)(b).

[35] Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ 2001 L 8/1).

[36] Decision No 12-2005, Article 5.

[37] Regulation (EC) No 45/2001, Article 8(b).

ranted and what limits are placed on the findings that the ECA may publish in its reports?

The *Ismeri* case[38], in which the ECA was involved as a party to the proceedings, is directly relevant to that question. The case concerned an action for damages for harm allegedly suffered by an auditee following criticisms made against him in a report of the ECA. According to the applicant, these criticisms were unfounded and the ECA should not have mentioned the applicant's name in its report. In this context it becomes relevant to observe that the right to privacy is not absolute and that it can therefore be subject to restrictions. Such restrictions will, however, only be acceptable if they relate to objectives of general interest pursued by the Union and do not constitute a disproportionate and intolerable interference which infringes upon the very substance of the rights protected[39].

The reporting of financial maladministration affecting the lawfulness of expenditure under the budget of the Union is one of the main tasks with which the ECA has been entrusted. The public interest in reporting the full facts relating to such maladministration - including the names of those individuals directly involved - has to be weighed against the interference in the private life of these persons that such publication will inevitably entail. The EGC decided in the *Ismeri* case that the ECA may - exceptionally - in the performance of its tasks publish the name of any parties directly involved in a *serious* case of financial maladministration. The naming of those involved is, according to the EGC, all the more necessary where a grant of anonymity might give rise to *confusion* or cast doubt on the identity of those concerned, which might harm the interests of other persons involved in the investigation of the ECA but not implicated in the specific behaviour to which the critical assess-

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[38] CFI, *Ismeri Europa v. Court of Auditors*, T-227/97, EU:T:1999:124, confirmed on appeal in ECJ, *Ismeri Europa v. Court of Auditors*, C-315/99 P, EU:C:2001:391.

[39] ECJ, *Volker und Markus Schecke and Eifert*, Joined Cases C-92/09 and C-93/09, EU:C:2010:662, para. 65; CFI, *M v. Ombudsman*, T-412/05, EU:T:2008:397, para. 126.

ments at issue relate[40]. This ruling can be contrasted with another case, *M v. Ombudsman*, in which a report of the EU Ombudsman directly mentioned a particular official of the European Commission[41]. In that instance, the EGC decided, on the facts of that case, that it was not necessary for the Ombudsman to name the individual concerned in order to perform properly his tasks, nor, indeed, in order to avoid confusion of the sort mentioned above. It therefore came to the opposite conclusion to that reached in *Ismeri*.

In any event, whenever the ECA, or indeed any other EU body, intends to adopt a decision which may perceptibly affect a person's interests[42] - by causing harm to his or her reputation for example - principles of good administration[43] require that the person concerned should be heard. That right aims to give the person affected the opportunity to exercise his or her rights of defence. In practice, this means that a person whose interests are at stake should have an opportunity to make observations *before* the audit report is definitively adopted[44]. Any negative findings will be fully subject to review by the EGC and may give rise to non-contractual liability of the EU if either the facts reported are not substantially correct or the interpretation placed on the facts, although they may be substantively correct, is erroneous or one-sided[45].

Principles of good administration, besides involving the right to be heard, also encompass the right to have one's affairs handled impartially, fairly and within a reasonable time. This important princi-

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[40] CFI, *Ismeri Europa v. Court of Auditors*, T-277/97, EU:T:1999:124, para. 109.

[41] CFI, *M v. Ombudsman*, T-412/05, EU.T:2008:397, paras 129-131.

[42] See ECJ, *Ismeri Europa v. Court of Auditors*, C-315/99 P, EU:C:2001:391, para. 28; see also ECJ, *M v. EMEA*, C-197/09 RX-II, EU:C:2009:804, para. 41.

[43] Enshrined in Article 41 of the Charter of Fundamental Rights.

[44] ECJ, *Ismeri Europa v. Court of Auditors*, C-315/99 P, EU:C:2001:391, paras 29-32.

[45] CFI, *Ismeri Europa v. Court of Auditors*, T-277/97, EU:T:1999:124, para. 110.

ple of EU law has now been incorporated into the Charter of Fundamental Rights[46].

In the light of those requirements, audit principles at EU level provide for fact-finding procedures which are based on the 'no surprise' principle and for two separate rounds of consultation of those concerned. In that regard, recital 61 in the preamble to the EU's Financial Regulation[47] states that:

> 'The [ECA] should ensure that any of its findings that could have an impact on the final accounts of auditees or the legality or regularity of their underlying transactions, are transmitted to the institution or body concerned in good time in order to allow such auditees sufficient time to address those findings.'

The first consultation takes place after the fact finding during the audit in the form of a statement of preliminary findings - in practice, often by means of a letter setting out those findings - and the second on the basis of the draft report during the adversarial procedure. The ECA's audit focuses principally on the activities of the European Commission, but many other parties may also be involved. Those parties are generally referred to as 'the beneficiaries' of EU funds, for instance a university in receipt of 'Horizon 2020' funds or a farmer benefiting from aid under EU programmes on agriculture and rural development. Those parties are often subject to audits of the European Commission - sometimes carried out in practice by external private auditors hired by the Commission - and the ECA. Principles of good administration apply in both those situations. An analysis of the instructions given to auditors, for instance the Financial and Compliance Audit Manual, calls for two contrasting and yet, ultimately, complementary, observations. On the one hand, the procedures and other rules governing audits are

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46 Article 41, Charter of Fundamental Rights.

47 Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002.

set out in detail in such instructions. On the other hand, it is clear that a manual of this sort is *not* drafted specifically with legal principles of good administration in mind. However, when one reads the manual in light of those principles, one can clearly identify the following elements that reflect 'good administration' practices, concerning all of the three key stages of the process: the planning of the audit, the execution of the audit process itself and the subsequent reporting of the audit. For instance, the auditor should prepare all audit documentation on a timely basis. The audit process is submitted to systematic quality control. Professional judgment and scepticism should be exercised when planning as well as when performing and reporting on audits. Sufficient, relevant and reliable audit evidence is also required in order to substantiate audit conclusions. Moreover, as mentioned above, third parties receive protection if they are identified in a report. These expressions of principles of good administration in relation to audit practices illustrate the fact that general principles of EU law have an important role to play in the work of auditors, not least those working for the ECA.

CONCLUSION

What are the implications of general principles of EU law for audit practice? This paper set out to provide some insight into those principles of law as they are relevant to auditors. Firstly, we have explained how general principles of EU law came into being and how they play out in the context of the audit activities of the ECA. General principles of EU law have an important role to play in the interpretation of legislation, forming the basis for judicial review as well as enabling the EU courts to fill in gaps left by the legislator. For example, in cases concerning access to information or the retroactive application of rules, the principles of proportionality and legal certainty are highly relevant both for auditors and for the beneficiaries of EU funds.

Despite the fact that audit standards are not, as such, specified by the EU legislator, general principles of EU law require that those standards be clear, precise and predictable in their effects. General

principles of EU law thus serve as guiding principles for audit activities in helping to define principles of good audit.

Auditors should apply general principles of EU law during the audit process and use them as a frame of reference in applying audit standards. Principles of good audit need to encompass a number of general principles of EU law. In order to form a sound professional judgment on the audit issue at hand, auditors need to look at *1)* the text (*i.e.* the rules that should apply), *2)* the context (in which these rules are used, taking into account any specific circumstances, where necessary and applicable) and *3)* the intention of the rules (*i.e.* whether the rules were used in line with their overarching purpose and principles, including principles of good audit/administration).

A proper application of the principle of the rule of law has the potential to improve the audit practice carried out in relation to EU funds by means of better interpretation of the applicable rules, through the promotion of transparency concerning the norms applied and by avoiding the imposition of unnecessary economic burdens on business that may result from unpredictable audit outcomes, or from disproportionate requests for detailed information. For beneficiaries of EU subsidies, the application of these general principles of EU law in audits is fundamental so that they may perceive that they are being treated fairly and in order to develop a relation of trust between auditor and auditee. For the European Union more generally, trust between European institutions and those whose affairs they administer, whether they are private citizens or economic undertakings, is key in gaining their support for the EU-project.

ABSTRACTS / RÉSUMÉS

Audit in the EU is not only ruled by law but also by audit standards which stem from the international audit practice. What are the implications of general principles of EU law for audit practice? This paper sets out to provide some insights into those principles of law as they are relevant to auditors. For example, in cases concerning access to information or the retroactive application of rules, the principles of proportionality and legal certainty are highly relevant both for auditors and for the beneficiaries of EU

funds. For that reason auditors should apply general principles of EU law during the audit process and use them as a frame of reference in applying audit standards. Principles of good audit need to encompass a number of general principles of EU law. For beneficiaries of EU subsidies, the application of these general principles of EU law in audits is fundamental so that they may perceive that they are being treated fairly and in order to develop a relation of trust between auditor and auditee.

Au sein de l'UE, l'audit est régi par la loi mais aussi par les normes d'audit qui dérivent de la pratique internationale. Quelles implications les principes généraux du droit de l'Union ont-ils sur la pratique de l'audit? Cet article présente quelques aspects de ces principes de droit qui sont pertinents pour les auditeurs. Par exemple, dans un cas concernant l'accès à l'information ou l'application rétroactive de règles, les principes de proportionnalité et de sécurité juridique sont hautement pertinents pour les auditeurs et pour les bénéficiaires de fonds européens. C'est pourquoi les auditeurs doivent appliquer les principes généraux du droit de l'Union durant la procédure d'audit et les utiliser comme cadre de référence dans l'application des normes d'audit. Les principes de bon audit doivent inclure un certain nombre de principes généraux du droit de l'Union. Pour les bénéficiaires de fonds européens, la mise en œuvre de ces principes généraux du droit de l'Union lors des audits est fondamentale pour qu'ils aient le sentiment d'être traités équitablement et pour développer une relation de confiance entre auditeur et audité.

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